Marshal L. Mickelson
Clark R. Hensley
CORETTE BLACK CARLSON & MICKELSON
129 West Park Street
P.O. Box 509
Butte, MT 59703
PH : 406-782-5800
FAX : 406-723-8919
mmick@cpklawmt.com
chensley@cpklawmt.com

Attorneys for Defendant Natasha J. Morton

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MICHAEL F. LAFORGE, Plaintiff, v. JANICE GETS DOWN, NATASHA J. MORTON, LEROY NOT AFRAID, SHEILA WILKENSON NOT AFRAID, Defendants.	*	No. CV-17-48-BLG-BMM-TJC **BRIEF IN SUPPORT OF DEFENDANT NATASHA J. MORTON'S MOTION TO DISMISS COMPLAINT**

INTRODUCTION AND BACKGROUND

Plaintiff Michael LaForge filed his complaint in this matter on May 5, 2017, alleging defendants, including defendant Natasha Morton, violated "Constitutional Rights, Disability Act, Treaty Rights, Civil Rights" on July 12, 2016, due to a "Judgment of Property," which, as a cancer patient, "caused [him] distress and mental and physical[] stress" while he was going through chemo and radiation

therapy. (Doc 9, Complaint ¶¶ IV-V). Plaintiff's claim for relief indicated his modular home was removed from his trust land and he wants "defendants to pay all damages." *Id*. at ¶ VI. Plaintiff's complaint does not contain any other factual allegations and does not specify what actions defendant Morton took to harm him or how her actions in particular actually harmed him.

On May 9, 2017, this court pre-screened plaintiff's complaint because plaintiff is proceeding in forma pauperis. (Doc 8). In doing so, the court interpreted his complaint as alleging defendants "a number of Crow Tribal Court officials, wrongfully entered judgment to remove his modular home from his trust land." *Id*. Based on that interpretation, the court concluded that his complaint sufficiently alleged facts to merit service. *Id*. As evinced in the judgment referenced in the complaint and in the tribal court records, defendant Morton requests the court to take judicial notice of her role in the underlying case as merely defendant Janice Gets Down's private attorney in her dissolution proceeding against plaintiff. *See* Exhibit A (Findings of Fact, Conclusions of Law and Decree of Dissolution attached hereto).

Although the complaint itself is unclear, defendant Morton agrees with this court's previous order interpreting it as alleging "a number of Crow Tribal Court officials, wrongfully entered judgment to remove his modular home from his trust land." Nevertheless, defendant Morton respectfully requests the court to dismiss

the complaint as against her under Fed. R. Civ. P. 12(b)(6) because either it (1) does not allege sufficient facts to support a cognizable legal theory against her, or (2) it does not make out a cognizable legal theory against her.

ARGUMENT

Plaintiff's complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because either (1) it does not allege sufficient facts to put defendant Morton on notice of what she did wrong as she is not a tribal court official and did not enter judgment against plaintiff; or (2) even if sufficient facts were alleged as against defendant Morton, it does not allege a cognizable legal theory against her because private attorneys do not act under the color of the law for § 1983 purposes and are not public entities required for application of the Americans with Disabilities Act (ADA) to this particular case.

Dismissal Under Fed. R. Civ. P. 12(b)(6)

In order for a complaint to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 12(b)(6) "requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). To show facial plausibility, a complaint must plead "more than a sheer possibility that a defendant has acted unlawfully" and must contain sufficient factual content for the court to

draw the reasonable inference that defendant is liable for the alleged misconduct. *Iqbal*, 556 U.S. at 678; *B.Y.O.B., Inc. v. Montana*, 2015 WL 5671182, *2 (D. Mont. 2015).

A complaint is subject to dismissal pursuant to Rule 12(b)(6) if either (1) it does not "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively"; or (2) its factual allegations, taken as true, do not plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. *Starr v. Baca*, 652 F.3d 1202, 1215-1216 (9th Cir. 2011). Even pro se pleadings must meet a "minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995); *Fanuzzi v. Bank of the Rockies NA*, 2011 WL 5288883, *3 (D. Mont. 2011).

With respect to his allegations against defendant Morton, plaintiff's complaint clearly does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In actuality, it contains no factual matter whatsoever pertaining to defendant Morton's liability for the alleged misconduct. In agreement with this court's previous order, the complaint, at most, may contain factual allegations that Crow Tribal Court officials wrongfully entered judgment to

remove his modular home from his trust land. However, the complaint does not contain any allegations that defendant Morton is a Crow Tribal Court official, that defendant Morton entered judgment against him, how the judgment entered was wrongful, or how she discriminated against him. As a result, no reasonable inference can be drawn that defendant Morton is liable for the alleged conduct and no defendant could be expected to defend itself effectively from plaintiff's complaint. Therefore, this court should dismiss plaintiff's complaint as against defendant Morton.

Alternatively, should this court find sufficient factual allegations in the complaint to plausibly show plaintiff is entitled to relief and defendant Morton is liable for the misconduct, the court should still dismiss the complaint because plaintiff's claims are not viable as against defendant Morton. In ruling on a Motion to Dismiss under Rule 12(b)(6), the court is generally confined to the complaint but may consider material referenced in the complaint or take judicial notice of matters of public record, including other court proceedings, without converting the motion to dismiss into a motion for summary judgment. *Paatalo v. First American Title Co. of Montana, Inc*., 2014 WL 1365752, *5 (D. Mont. 2014) (citing *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995)); *Redman v. Bank of America, N.A.*, 2015 WL12780571, *2 (D. Mont. 2015); *B.Y.O.B.*, 2015 WL 5671182 at *2.

Here, the court should take judicial notice of the fact that defendant Morton was merely defendant Janice Gets Down's private attorney in the underlying action and not a Crow Tribal Court official that entered judgment against plaintiff. *See* Exhibit A. Based upon the complaint vaguely alleging violations of plaintiff's "Constitutional Rights, Disability Act, Treaty Rights, Civil Rights" and his modular home was removed due to a judgment of property, plaintiff's claims presumably arise under § 1983 and the ADA. With that perspective and taking the allegations as true, plaintiff's complaint failed to make a cognizable claim against defendant Morton because private attorneys do not act under the color of the law for § 1983 purposes and are not public entities required for application of the ADA.

For liability under § 1983 to arise, defendant must be acting under the color of the law. 42 U.S.C. § 1983. United States Supreme Court precedent, as well as precedent from other courts throughout the country, hold that private attorneys acting on behalf of their clients do not act under the color of the law for § 1983 purposes. *Polk v. Dodson*, 454 U.S. 312, 318 (1981) (holding "a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983"); *Sinclair v. Spatocco*, 452 F.2d 1213 (9th Cir. 1971) (holding "[s]ervices performed by an attorney in connection with a lawsuit do not constitute action under color of state law"); *Sutton*

v. Llewellyn, 288 Fed. Appx. 411, 412 (9th Cir. 2008) (holding private attorney did not act under color of the law even though he was appointed conservator by the court); *Poel v. Webber*, 899 F. Supp. 2d 1155, 1160 (D. N.M. 2012) (holding lawyers may not become state actors merely by obtaining orders from a state judge); *see Catz v. Chalker*, 142 F.3d 279, 289 (6th Cir. 1998) (overruled on other grounds) (affirming trial court's sua sponte dismissal of plaintiff's § 1983 claims against ex-wife's attorneys based upon their conduct in the underlying divorce proceeding); *see also O'Bradovich v. Village of Tuckahoe*, 325 F. Supp. 2d 413, 419 (S.D. N.Y 2004).

Further, the only portion of the American Disabilities Act that may conceivably apply to this case is discrimination based on exclusion from participation or denial of benefits from a public entity, which only prohibits discrimination by a public entity. 42 U.S.C. § 12132. A public entity is a (1) "State or local government"; (2) "department, agency, special purpose district, or other instrumentality of a State or States or local government"; or (3) a National Railroad Passenger Corporation, and any commuter authority." 42 U.S.C. § 12132.

If the court finds sufficient factual allegations in the complaint that plausibly show plaintiff is entitled to relief and defendant Morton is liable for the misconduct, which defendant Morton does not believe exist, the court should still dismiss the complaint for failure to make a viable claim against her. Based on the

tribal court records and judgment, defendant Morton's participation underlying plaintiff's claims was merely as a private attorney acting on behalf of her client. Consequently, plaintiff's allegations, taken as true, do not make a cognizable claim against her under § 1983 because she was not acting under the color of the law. Furthermore, defendant Morton clearly is not a public entity under the ADA and whatever discrimination plaintiff alleges cannot be attributed to her. As a result, plaintiff also failed to make a cognizable claim against defendant Morton under the ADA. Notably, plaintiff's complaint also failed to plead any factual allegations to suggest defendant Morton was acting under the color of the law or was a public entity, which further amplifies her argument that sufficient factual allegations in the complaint are lacking.

Therefore, the complaint should be dismissed as against defendant Morton pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim against her upon which relief may be granted.

CONCLUSION

Defendant Morton respectfully requests that the claims against her be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

DATED this 6th day of June, 2017.

s/ Marshal L. Mickelson
Corette Black Carlson & Mickelson
Attorneys for Defendant Natasha Morton

CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on this 6th day of June, 2017, a copy of the foregoing document was served on the following persons by the following means:

1 CM/ECF
2 Mail

1. Clerk, U.S. District Court

2. Michael F. LaForge
P.O. Box 144
Hardin, MT 59034

/s/ Marshal L. Mickelson
Corette Black Carlson & Mickelson
Attorneys for Defendant Natasha Morton

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Local Rule 7.1(d)(2). The total word count in the brief is 1,699 words, excluding the caption and certificates of service and compliance. The undersigned relies on the word count of the word processing system used to prepare this brief.

s/ Marshal L. Mickelson
Corette Black Carlson & Mickelson
Attorneys for Defendant Natasha Morton